

Case C-98/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

14 February 2022

Referring court:

Cour d'appel de Paris (France)

Date of the decision to refer:

2 February 2022

Appellant:

Eurelec Trading SCRL

Respondent:

Ministre de l'Économie et des Finances

Scabel SA

Groupement d'Achat des Centres Édouard Leclerc (GALEC)

Association des Centres distributeurs Édouard Leclerc (ACDLEC)

Brief presentation of the facts and of the procedure in the main proceedings

- 1 The dispute in the main proceedings is between the Ministre français de l'Économie et des Finances (French Minister for Economic Affairs and Finance) and two Belgian companies: Eurelec, a Belgian company established in Brussels, which is a pricing and purchasing negotiation centre founded by the French Leclerc group and the German Rewe group, and Scabel, a Belgian company established in Brussels, which acts as an intermediary between Eurelec and the French and Portuguese regional purchasing centres of the Leclerc group. Two French undertakings are also parties to the dispute: the Leclerc group' national purchasing centre which negotiates the annual framework contracts with the French suppliers ('GALEC') and the association of E Leclerc distribution centres ('the ACDLEC').

- 2 Following an investigation conducted between 2016 and 2018, the Minister for Economic Affairs and Finance ('the Minister'), suspected that potentially restrictive practices were being implemented in Belgium by Eurelec in respect of suppliers established in France. Eurelec, Scabel, GALEC and the ACDLEC deny the alleged practices.
- 3 The Minister brought an action against those four companies before the tribunal de commerce de Paris (Commercial Court, Paris) seeking a declaration inter alia that the practices of those companies consisting in (i) requiring suppliers to accept that Belgian law applied to the contract concluded, with the aim of denying them the benefit of the public policy provisions laid down by the code de commerce français (French Commercial Code), inter alia those allowing for the contract to be freely negotiated on the basis of the supplier's general terms and conditions of sale, and (ii) imposing on suppliers, by implementing organised and large-scale retaliatory measures, significant deflations of the previous year's triple net price without anything in return constitute subjection to a significant imbalance in the parties' rights and obligations.
- 4 By judgment of 15 April 2021, the tribunal de commerce de Paris (Commercial Court, Paris) held that the plea of lack of jurisdiction raised by the companies was unfounded. It also disallowed their requests for a preliminary ruling on the interpretation of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) ('the Brussels Ia Regulation'). It declared that it had jurisdiction to rule on compliance with Article L442-6 (now L442-11) of the Commercial Code on French territory in connection with the dispute and requested the parties to attend a subsequent hearing for submissions on the merits.
- 5 By documents of 18 and 21 May 2021, Scabel and Eurelec lodged an appeal against that judgment before the Cour d'appel de Paris (Court of Appeal, Paris).
- 6 The Cour d'appel de Paris (Court of Appeal, Paris) (the referring court) is therefore called upon to determine whether the French courts have jurisdiction to hear an action brought by the French authorities against companies established in Belgium seeking an order recognising, penalising and putting an end to alleged restrictive practices in respect of suppliers established in France.

Essential arguments of the parties in the main proceedings concerning the civil and commercial nature, within the meaning of the Brussels Ia Regulation, of the Minister's action

- 7 According to Eurelec, the nature and subject matter of the Minister's action and the evidence he has used in support of that action, may remove these proceedings from the scope of the Brussels Ia Regulation. In that regard, it submits that, although classified as an overriding mandatory provision, a rule of national law

applicable to the substance of the dispute cannot serve as a basis for the international jurisdiction of the French courts.

- 8 Eurelec and Scabel, claiming that the concept of ‘civil and commercial matters’ within the meaning of Article 1 of the Brussels Ia Regulation cannot be interpreted by reference to the internal law of the Member State, maintained that the Minister’s action, owing to its nature and subject matter, falls within the exercise of public powers characterised by the exercise of powers which are excessive in relation to the ordinary law rules applicable in relations between individuals, and that therefore the dispute does not concern civil and commercial matters.
- 9 According to those companies, imposing a civil fine cannot be confused with the prerogative of individuals to claim damages for harm which they have suffered directly and the Minister uses evidence obtained through public powers, in this case visits and seizure operations in the premises of the ACDLEC and GALEC pursuant to Article L 450-4 of the Commercial Code, although the procedural powers offered by Article 145 of the Code of Civil Procedure to private persons cannot be equated to the powers of investigation enjoyed by the State authority. In that regard, they claim that any natural or legal person, even a public body, may act on the basis of Article 145 of the Code of Civil Procedure, which is not the case of Article L-450-4 of the Commercial Code. Moreover, opposing a measure of inquiry *in futurum* ordered on the basis of Article 145 of the Code of Civil Procedure does not constitute an offence, although any opposition to the visits and seizures of the direction générale de la concurrence, de la consommation et de la répression des frauds (Directorate General for Competition, Consumer Affairs and Prevention of Fraud) of the Ministry for Economic Affairs and Finances constitutes an offence of obstructing an investigation (Article L 540-8 of the Commercial Code).
- 10 Eurelec also submits that, in a judgment of 6 July 2016, No 15-21.811, the Cour de cassation (Court of Cassation) recognises that the Minister’s action, by its very nature and subject matter, forms part of the Minister’s public powers.
- 11 According to the Minister, his applications fall within the material scope of the Brussels Ia Regulation and there is neither a problem of interpretation nor a reasonable doubt justifying a question for a preliminary ruling, in the light of the replies provided by the judgment of 16 July 2020, *Movic and Others* (C-73/19, EU:C:2020:568); he considers that the advantage of such a reference has not been established since the alleged inapplicability of that regulation still does not give jurisdiction to the foreign court.
- 12 The Minister claims that, as the Court states in the judgment of 16 July 2020, *Movic and Others* (C-73/19, EU:C:2020:568), ‘acting in the general interest should not be confused with the exercise of public powers’, that the provisions of Article L 442-6, 1, 2° of the Commercial Code are mandatory as regards the protection of the French economic policy and he intervenes in order to defend the

general interest in order to obtain an order for a civil fine. According to the Minister, since the aim of his action is to defend the French economic policy, it is only natural for that action to be heard by the French court, as the Cour de cassation (Court of Cassation) stated in the judgment of 6 July 2016, cited above.

- 13 As regards the use of its powers of inquiry, he considers it necessary to distinguish the inquiry stage from the judicial proceedings and maintains that the criterion for applicability of the Brussels Ia Regulation is the use made of that evidence and not the rules for collecting it. He relies in that regard on the Opinion of Advocate General Szpunar in *Movic and Others* (C-73/19, EU:C:2020:297, paragraph 59), adding that in *Movic*, the exercise by the State monitoring authorities of powers of inquiry by which they establish findings on which to base their legal action, did not preclude the application of the Brussels Ia Regulation. He submits that the court which rules on that evidence has never declared that it did not have jurisdiction, even when foreign companies were concerned as in the Apple, Expedia or Booking cases, and that it is not consistent to vary the application of the regulation depending on the nature of the evidence.

Lastly, he adds that his action puts him on equal footing with the defendants, since they are subject to the rules of the Code of Civil Procedure which are applicable to all the parties in the case, with all the corresponding safeguards and that the classification of the infringement and the penalty imposed, if appropriate, are subject to the sovereign assessment of the court seised.

Succinct presentation of the reasoning in the reference for a preliminary ruling

- 14 The Minister bases his action on the provisions of Article L 442-6, I, 2°, of the French Commercial Code in the version thereof prior to Ordinance No 2019-359 of 24 April recasting Title IV of Book IV of the Commercial Code which, in Article 2, replaces them with the provisions of L 442-1, I, of that code.
- 15 (Former) Article L 442-6 of the Commercial Code provides: ‘I. Any producer, trader, manufacturer or person registered in the trades register shall be liable for, and obliged to compensate for the harm resulting from, any act which:

...

2° subjects or attempts to subject a commercial partner to obligations creating a significant imbalance in the rights and obligations of the parties.

...

III. – Proceedings may be brought before the competent civil or commercial court by any person who provides proof of a legitimate interest, the Public Prosecutor’s Office, the Minister for Economic Affairs or the president of the Competition Authority, when he detects a practice mentioned in this article in cases under his jurisdiction.

...'

- 16 The companies facing prosecution contest the jurisdiction of the French court to hear the Minister's action against the two Belgian companies. It is therefore a matter, in this case, of determining whether the court of the Member State has jurisdiction to hear an action brought by authorities of that State against companies established in another Member State for a declaration recognising, penalising and putting an end to alleged restrictive practices in respect of suppliers established in the Member State, in this case France.
- 17 Is the Brussels Ia Regulation applicable? Article 1(1) provides: 'This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'.
- 18 According to the Court (judgment of 16 July 2020, *Movic and Others*, C-73/19, EU:C:2020:568), Article 1(1) of the Brussels Ia Regulation must be interpreted as meaning that an action where the opposing parties are the authorities of a Member State and businesses established in another Member State, in which those authorities seek, primarily, findings of infringements constituting allegedly unlawful unfair commercial practices and an order for the cessation of such infringements and, as ancillary measures, an order for publicity measures and the imposition of a penalty payment, falls within the scope of the concept of 'civil and commercial matters' in that provision.
- 19 In the judgment in *Movic*, the Court stated:
 - in paragraph 33, that the concept of 'civil and commercial matters' must be regarded as an autonomous concept to be interpreted by reference, first, to the objectives and scheme of that regulation and, second, to the general principles which stem from the corpus of the national legal system;
 - in paragraph 34, that the need to ensure the smooth functioning of the internal market and the need to ensure, in the interests of the harmonious administration of justice, that irreconcilable judgments will not be delivered in the Member States require a broad interpretation of that concept of 'civil and commercial matters';
 - in paragraph 35, that it has repeatedly held that, although certain actions where the opposing parties are a public authority and a person governed by private law may come within the scope of the Brussels Ia Regulation, it is otherwise where the public authority is acting in the exercise of its public powers;
 - in paragraph 36, that the exercise of public powers by one of the parties to the action, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes

such an action from ‘civil and commercial matters’ within the meaning of Article 1(1) of the Brussels Ia Regulation;

- in paragraph 37, that in order to determine whether or not a matter falls within the scope of the concept of ‘civil and commercial matters’ within the meaning of Article 1(1) of the Brussels Ia Regulation, and, consequently, whether it comes within the scope of that regulation, it is necessary to determine the nature of the legal relationships between the parties to the action and the subject matter of the action or, alternatively, the basis of the action and the detailed rules applicable to it;
 - in paragraph 57, that only where, due to the use to which a public authority has put certain pieces of evidence, it is not specifically in the same position as a person governed by private law in the context of a similar action, would it be appropriate to make a finding that such an authority has, in the particular case, exercised public powers;
 - in paragraph 59, that it is not apparent from the information available to the Court that, in the context of the proceedings pending before the referring court, the Belgian authorities made any use of evidence collected by exercising their public powers, which, as the case may be, it falls to the referring court to verify.
- 20 The referring court wonders whether the solution given by that judgment may be transposed to the action for significant imbalance brought by the Minister seeking a declaration of the existence of restrictive practices. It considers that in order to answer that question, it is necessary to examine the action brought by the Minister against those two Belgian companies from the point of view of the French system.
- 21 Under (former) Article L 442-6 of the Commercial Code, although the victim may claim damages for the harm caused by the practices at issue and request cessation of the practice or annulment of a term, only the Minister and the Public Prosecutor’s Office may apply for the perpetrator of the practices to be ordered to pay a civil fine.
- 22 In addition to the fact that the Minister, who intervenes on behalf of the general interest, does not have to justify his interest in bringing proceedings and benefits from an action classified as autonomous according to the judgment of the Cour de cassation (Court of Cassation) of 6 July 2016 cited above, he may use his powers of investigation.
- 23 In the present case, the Minister produces evidence which he has gathered in the premises of the ACDLEC and of GALEC pursuant to the provisions of Article L 450-4 of the Commercial Code which allow him to arrange for agents of the Competition Authority authorised for that purpose to conduct visits in any places and seize documents and any data medium. The evidence thus gathered is nevertheless subject to the principle of freedom to challenge the evidence in civil proceedings.

- 24 In comparison, as regards evidence, private persons do not enjoy those powers but may have recourse to measures of inquiry *in futurum* which may be ordered on the basis of Article 145 of the Code of Civil Procedure at the request of any natural or legal person, even a public body, such as an order to produce documents, an order that an expert opinion be obtained or preventive attachments carried out by bailiffs. These investigative measures may be obtained on request, that is to say on an *ex parte* basis when they are shown to be necessary.
- 25 Moreover, opposing a measure of inquiry *in futurum* ordered on the basis of Article 145 of the Code of Civil Procedure does not constitute an offence, although any opposition to the visits and seizures of authorised officials constitutes an offence of obstructing an investigation.
- 26 Therefore, the referring court wonders if, as in this case, where the Minister uses his specific powers of investigation to establish the existence of practices constituting a significant imbalance in the rights and obligations of the parties and asks the court to order a civil fine in order to sanction them, he is using a public power in bringing his action which excludes it from the scope of the Brussels Ia Regulation as it does not concern civil and commercial matters.
- 27 Thus, in view of the specific nature of the Minister's action in French law, there is reasonable doubt that the action as brought by the Minister in this case falls within the material scope of the Brussels Ia Regulation, applicable to 'civil and commercial matters', which justifies making a reference for a preliminary ruling under Article 267 TFEU.
- 28 The referring court stays the proceedings and refers the following question to the Court of Justice for a preliminary ruling:

Are 'civil and commercial' matters, as defined in Article 1(1) of Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to be interpreted as including in the scope of that regulation an action – and the judicial decision rendered at the end of the proceedings – (i) brought by the French Minister for Economic Affairs and Finances pursuant to (former) Article L 442-6, I, 2° of the French Commercial Code against a Belgian company, (ii) seeking a declaration of the existence of restrictive practices, an order that they cease and an order that the alleged perpetrator of those practices pay a civil fine, (iii) on the basis of evidence obtained in the exercise of his specific powers of investigation?